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# Slavery in the Constitution: The Ironic Shifts in Tension Over Three Pivotal Clauses

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# Table of Contents

# Introduction

In 1842 the United States Supreme Court came to an 8-1 decision in a case that was highly controversial on a national scale. While *Prigg v. Pennsylvania* (1842) directly involved only the fate of one family, it held major significance for all the inhabitants of the nation, whether enslaved or free. When Justice Joseph Story delivered the Opinion of the Court that the Fugitive Slave Act of 1793 was constitutional and no state could pass any law expanding upon or interfering with the regulations contained therein, it became quite clear that slaveholders had gained a major victory over those opposed to the institution. Yet these terms were not the only cause for concern among anti-slavery advocates, as the Court went on to state that slave owners and their hired agents possessed the right to self-help in regards to recapturing their fugitive slaves, that state officials were recommended but not required to assist in this process, and that the accused runaway was not entitled to the right of due process.[1] Although tension had been building over the issue of fugitive slaves throughout the early nineteenth century, not until Edward Prigg and his party kidnapped a black woman named Margaret Morgan and her family from freedom in Pennsylvania in order to bring them to work as slaves in Maryland did the turmoil truly become a national concern. Prigg abducted the family after failing to produce definitive evidence to a Pennsylvania judge that Morgan was a runaway slave. This came up short of the regulations set forth by the state, and Morgan and her family were declared free. In an attempt to defend Prigg, the defense asserted that the requirements set by Pennsylvania were unconstitutional because they went beyond the national regulations set forth by Congress in the Fugitive Slave Act of 1793.

[1] "*Prigg v. Pennsylvania*," in Melvin I. Urofsky and Paul Finkelman eds., *Documents of American Constitutional & Legal History: Volume I, From the Founding to 1896*, 3rd ed., 329.

The law of Congress questioned in *Prigg* grew out of Article IV, Section 2 of the United States Constitution, or what is commonly referred to as the fugitive slave clause. This is one of the three main segments of the document which directly dealt with the institution of slavery. Article I, Section 2 and Article I, Section 9 are the other two provisions. The former set forth the value of slaves in terms of representation and direct taxation, while the latter outlined the ability of Congress to regulate the importation of slaves. Following their establishment, these sections became known as the three-fifths clause and the slave trade clause, respectively. Although neither the word 'slave' nor 'slavery' appear in the Constitution, it does not require much effort to realize what these provisions intended. All had been created in Philadelphia, Pennsylvania by the delegates to the Constitutional Convention of 1787, yet received different levels of attention. The three-fifths and slave trade provisions were discussed at length by the delegates to the Convention and there were a variety of opinions expressed on the matter. Yet following the ratification of the Constitution these sections proved to lead to no further level of serious tension. Conversely, the section regarding fugitive slaves was not debated in 1787, and was basically thrown into the document as an afterthought. Unlike the other two slave-related clauses, in the years following the formal structuring of the United States, this particular aspect of the document was the center of a great deal of turmoil throughout the nation as it highlighted the increasingly sectional differences that existed between those states which favored slavery and those that did not. This paper seeks to bring to light the irony that the issues of apportionment for representation, along with taxation, and the slave trade were sources of major contention during the Constitutional Convention yet proved to receive minimal attention throughout their functional existence, while the provision for the treatment of fugitive slaves was seemingly unimportant in 1787 but proved to be immensely controversial on a national scale over the

following seventy years. Acts passed by Congress, *Prigg v. Pennsylvania* (1842), and the sheer number of slaves who participated in the effort of running away all played major roles in developing turmoil and exposing sectional differences.

There is a good deal of scholarship on the relationship between the Constitution and slavery. Prior to the early twentieth century, this focus was largely overlooked except by avid abolitionists whose publications had nearly been forgotten until being re-evaluated by a number of historians in recent years. Efforts such as these, along with a newfound interest in the topic, led to an increase in the amount of research conducted on slavery and the Constitution. Some authors have attempted to portray the founders as the developers of a proslavery document for selfish purposes, while others wish to lift the blame from these men in hopes of demonstrating that they did the best they could as a result of the context and circumstances surrounding them. While these interpretations are clearly different from one another, they have collectively been effective in shedding new light on the subject. The modern challenges to the traditional views of the founding fathers stem from those contributed by a prominent historian of the late nineteenth and early twentieth century who opened the door to new ways of interpreting the Constitution and the efforts behind its creation.

In 1913, Charles A. Beard published the first edition of his book titled, *An Economic Interpretation of the Constitution of the United States*. This scholarly work has remained relevant to this day resulting in large part from the fact that it was the first notable piece of literature which boldly challenged the long-held views as to how the United States was founded. Beard describes that prior to his efforts the three leading conceptions were: the nation was founded by guidance from above and morality, the uncanny ability of the English-speaking world to develop,

and the assumption that justice was the main instrument involved.[2] According to Beard, the major flaw with these interpretations was that they neglected to attempt to truly analyze the causes behind the formation of the United States, which he asserts were economic interests. In support of such a claim, the author discusses how the Philadelphia Convention consisted of only a certain number of delegates and that they held specific property interests. Beard suggests that nearly all those who were in favor of the proposed document were "merchants, money lenders, security holders, manufacturers, shippers, capitalists, and financiers and their professional associates…" while those in opposition were mostly "… the non-slaveholding farmers and the debtors."[3] Taking this into consideration, the author declares that it was clearly not a document created by or for the entirety of the population, but was instead an attempt to protect the monetary interests of a few. Although the main argument of this book does not explicitly focus on slavery, Beard does make clear that slaves were one of the major property interests of the time. This lack of specific attention to the institution and its impact on the formation of the Constitution opened the door for later scholars to utilize Beard as a starting point for examining this issue.

Two historians who have directly addressed the economic interpretation held by Beard are Staughton Lynd and David Waldstreicher. Both authors attempt to shed light on the impact of slavery on the creation of the Constitution and do so through a modern lens which developed through increased research since the time of Beard. In *Class Conflict, Slavery, and the United States Constitution*, Lynd expresses his opinion that Beard minimized the role of slavery and even went so far as to title his introduction "Beyond Beard." He contends that Beard lost sight of the institution as being "an independent force in the shaping and ratification of the document"

[2] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan Publishing Co., Inc., 1913), 1-4.

[3] Beard, 17.

through neglecting to examine the abolitionist complaints that the Constitution was evil through its compromise over slavery.[4] Going on, Lynd states that Beard was extremely vague in his discussion of the institution and although he categorizes slaves as property he does not specify any further. Lynd finds additional disagreement with the fact that Beard groups slaveholders with all other agrarian interests and pits them against capitalists.[5] In another book, *Slavery's Constitution: From Revolution to Ratification*, Waldstreicher similarly suggests that Beard's assertion that the Constitution was a reflection of the financial interests of capitalists against the farming class was exaggerated while the impact of slavery went overlooked.[6] Waldstreicher does acknowledge that the economic implications described by Beard are valuable to understanding the history of the United States, yet believes that such implications cannot be separated from those of the institution of slavery. While the recognition that Beard's work remains valuable is demonstrated by these authors, it is also evident that such historians are under the impression that he failed to sufficiently address the influence of slavery. In recent years most arguments on the issue have fallen under one of two categories: that the Constitution was proslavery or that it was neutral in its intent.

A strong case has been made by several authors that the document which shaped the United States was supportive of the peculiar institution. Waldstreicher states that the story of the founding needs to be retold and highlights his argument that slavery was intertwined with the formation of the famous document. He regards as a misconception the belief that the contradiction of the American Revolution and keeping blacks in bondage was a paradox left by

[4] Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution*, 2nd ed. (New York: Cambridge University Press, 2009), 148.

[5] Lynd, 151.

[6] David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009), 15.

the founders to be dealt with by later generations.[7] Rather, Waldstreicher holds that "slavery was as important to the making of the Constitution as the Constitution was to the survival of slavery."[8] He identifies a number of clauses in the document that directly involved the system and several others which had implications for it. Included in this list are the three provisions discussed in this paper, as well as the fact that counting slaves as three-fifths was beneficial to slaveholders because Congress was given the power to mobilize the militia as a means of suppressing uprisings.[9] In his work titled *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Paul Finkelman echoes the notion that there were a variety of Constitutional clauses which affected the institution of slavery in a largely positive way and views this as evidence that it was a proslavery document. He goes on to suggest that the debates surrounding the Convention and ratification process were heavily saturated with slavery and that in the end the slaveholders won the protection of the institution they were looking for. While both Finkelman and Waldstreicher make note of the fact that the words 'slave' and 'slavery' do not appear in the Constitution, they find it impossible to deny its strong presence.

These are not the only scholars to recognize the Constitution as favorable of the institution. Further arguments are made in *Class, Conflict, Slavery and the United States Constitution*, by Staughton Lynd, and *Slave Nation: How Slavery United the Colonies & Sparked the American Revolution*, by Alfred and Ruth Blumrosen. Both books claim that slavery was at the core of all political happenings in the late eighteenth century, and that the Constitution was supportive of the system. Lynd argues that it was a major failure of the founders to not remove, or even attempt to remove, slavery from the nation and that what they created was supportive of the institution and went directly against the efforts of the American Revolution. The Blumrosens

[7] Waldstreicher, 13.
[8] Waldstreicher, 17.
[9] Waldstreicher, 6.

convey similar beliefs, yet go a step further to claim that the agreement that the nation would continue to utilize and be shaped by slavery took place prior to the American Revolution and that the institution was one of the driving forces behind the conflict.[10] With the South growing in dependence on slavery and the North beginning to develop more and more into an antislavery region, the authors believe that the sections were headed towards becoming two separate entities. However, with the ruling of the *Somerset* case in Great Britain in 1772 (which declared that a slave brought to England by his master who then escaped was to remain free because of a conflict of laws in which Great Britain did not allow slavery within its borders), southern slaveholders grew fearful and sought to unite with the northerners, who "agreed to its (slavery's) permanence in the new nation."[11] While such an agreement was made early on, the authors contend that the compromise which resulted in the Constitution and Northwest Ordinance worked as a way of sealing the contract. Lynd finds this notion of significance, dedicating a chapter to an analysis of the nearly undeniable likelihood of a private agreement which allowed for the adoption of the Three-Fifths Compromise and the adoption of the Northwest Ordinance to come one day apart.[12]

Recent historians have also addressed the abolitionist views of the Constitution as presented in the century following its ratification. Staughton Lynd finds this area of scholarship overlooked, and believes it necessary to bring the efforts of these advocates back into the historical spectrum. A number of nineteenth century historians are taken into consideration resulting from the fact that they published abolitionist interpretations of the founding of the United States. These men include Horace Greeley, Henry Wilson, and Richard Hildreth, and

[10] Alfred W. Blumrosen and Ruth G. Blumrosen, *Slave Nation: How Slavery United the Colonies and Sparked the American Revolution* (Naperville, Illinois: Sourcebooks, Inc., 2005), xii.
[11] Blumrosen, xiii.
[12] Lynd, 185-186.

Lynd suggests that such individuals believed that the compromise over slavery within the Constitution betrayed the American Revolution, and states that through his own analysis it is clear that this concept is an accurate one.[13] Mentioned in the work of Lynd but more thoroughly addressed by Paul Finkelman are the strong opinions and actions by abolitionist William Lloyd Garrison and his followers. Finkelman begins his book with a discussion of the pure outrage expressed by the Garrisonians and how this anger caused them to withdraw from politics. Finding the Constitution to be an evil contract as a result of its protection of slavery this group believed participation in the government was corrupt and would only strengthen the peculiar institution.[14] Both Lynd and Finkelman draw upon the abolitionist critique of the Constitution as solid evidence of the protection and support of slavery found in the document, and it provides a foundation in each of their works.

Along these same lines, Gary B. Nash presents his view in *Race and Revolution* that the fact that slavery was protected in the Constitution was "not a judicious decision by the leaders of the new American nation but their most tragic failure."[15] The author asserts that this is the case because the 1770s and 1780s were the best opportunity for the institution of slavery to be abolished. Among other reasons, Nash states that anti-slavery sentiment was at a high point, the lower South was incapable to break off on their own, and that western lands could have been used for slaveholder compensation or to relocate free blacks. In his opinion these were all factors which made this the right time to rid the nation of slavery.[16] Although the author provides a solution with the final factor previously mentioned, Nash argues that the failure to take advantage of the circumstances was the result of a loss of "abolitionist fire" among northerners

[13] Lynd, 155-156, 183.

[14] Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 2nd ed. (Armonk, New York: M. E. Sharpe, Inc., 2001), 3.

[15] Gary B. Nash, *Race and Revolution*, (Madison, Wisconsin: Madison House Publishers, Inc., 1990), 6.

[16] Nash, 6-7.

and southerners alike when posed with the economic question of how to help slaveholders recover from the potential loss, and what to do with all the freed slaves.[17] Interestingly, Nash refutes the commonly accepted notion that South Carolina and Georgia would never have ratified the Constitution if the peculiar institution was not protected within it. While the other side of this opinion is presented later in this paper, in regards to the suggestion of Nash he claims that these two southernmost states were too weak to not join the union; namely as a result of their vulnerability through being so close to the Creek confederacy and Spanish-inhabited Florida.[18] The arguments presented by Nash are rather unique in comparison to the other literature on the subject, which has much to do with his decision to not grant much attention to the debates of the Constitutional Convention.

While the authors mentioned above find the compromise over slavery in the Constitution to be a failure or an atrocity on behalf of the founders, there are others who find the document to be more neutral in nature. Don E. Fehrenbacher writes in *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* that the current trend of blaming the founders for failing to abolish slavery at the founding of the nation is off-base. The author focuses heavily on the internal debates over the peculiar institution at the Convention in 1787 as a means of attempting to demonstrate the extent to which the matter was discussed. Fehrenbacher ultimately finds that "the Convention was severely limited… by its own internal differences" which resulted in a compromise that was completed out of necessity.[19] Viewing the efforts of the founders which culminated in the document as neither pro- nor anti-slavery, he contends that it was the manner in which it was interpreted and implemented during the

[17] Nash, 35.
[18] Nash, 27.
[19] Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United State Government's Relations to Slavery*, ed. Ward M. McAfee (New York: Oxford University Press, 2001), 39.

nineteenth century that made it appear as though the Constitution held that slavery was to be protected outright.[20] Along these same lines, Donald L. Robinson argues that the founders did not believe that slavery was dying out and as a result decided to protect it, as some have stated, but that they decided to avoid dealing too directly with the issue for other reasons. The differences in attitude toward the peculiar institution between the northern and southern states posed a tremendous challenge, one that at the time was impossible to overcome. Strong racial prejudices of the time also played a role in making the situation seem hopeless, and Robinson suggests that this was realized by the founders and slavery was deemed to be "ungovernable."[21]

Authors falling into the category of believing the Constitution to have had neutral intentions for the institution find that when the Convention and surrounding circumstances are taken in context, compromise was the only way by which a union could be formed – and it was one neither in favor nor in opposition of slavery. In *The Founding Fathers Reconsidered*, R. B. Bernstein utilizes this approach in a discussion of the men who formed the United States in terms of their overall efforts. He suggests that in order to best comprehend the actions of the founders it is necessary to "meet them eye to eye instead of gazing reverently upward or sneering contemptuously downward."[22] Such a view, Bernstein argues, reveals that they were simply men dealing with the issues at hand in the manner they saw best fit at the time. This included slavery, and the delegates to the Convention saw a union of the states as more pertinent than dealing too intensely with the peculiar institution. In order to ensure ratification in some states, especially South Carolina, the founders knew that it would be necessary to have a number of clauses

[20] Fehrenbacher, 47.

[21] Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich, Inc., 1971), 4.

[22] R. B. Bernstein, *The Founding Fathers Reconsidered* (New York: Oxford University Press, 2009), xi.

providing some level of protection for slavery, yet for the most part it was left to be dealt with by later generations.[23]

When writing about the founding of the United States there are some historians who do so through evaluating the debates and ratification process on a more specific level, such as examining the interests of a particular state. In regards to the study of the relationship between slavery and the creation of the Constitution, perhaps the most pivotal state was South Carolina. All of the authors mentioned previously refer to the founding document as being a compromise between different interests and sections, and Richard M. Weir has attempted to demonstrate how South Carolina was the most influential player in support of the peculiar institution. He suggests that if the Constitution had not protected slavery to a certain extent this particular state would never have agreed to join the union. With their five delegates to the Convention being prominent slaveholders who "considered the existence of slavery in South Carolina to be an absolutely un-negotiable issue," it soon became obvious to other members that compromise must be made.[24] Weir makes note of the fact that delegates from other states even went so far as to mention that the main reason for the protection of the slave trade in the Constitution was a direct result of the demands of South Carolina and Georgia.[25] Although it is not stated explicitly, such an understanding supports the argument of scholars such as Robinson and Fehrenbacher that the Convention developed a document that was necessary to ensure ratification and unity.

It is clear that there are various viewpoints on the relationship between slavery and the Constitution, yet such differing notions are the result of the complexity of the issue. The leading sources for gathering information on this subject are notes from the Constitutional Convention

[23] Bernstein, 100.

[24] Richard M. Weir, "South Carolina: Slavery and the Structure of the Union," in *Ratifying the Constitution*, ed. Michael Allen Gillespie and Michael Lienesch (Lawrence, Kansas: University Press of Kansas, 1989), 209.

[25] Weir, 209-210.

and the ratification debates of the states, or letters that have been preserved from the time period. Such a limited amount of material makes this issue one that is subject to a variety of interpretations. Those holding that the delegates to the Convention made a proslavery document for selfish gain and protection are able to support their claims with many of the same sources as those who find it neutral. While the sources mentioned above are intertwined with the topic of this paper, the argument presented here is unique in that it seeks to shed light on the ironic aspect of the relationship between the three main slave-related clauses of the Constitution and the importance of these in 1787 as compared with the course of the next seventy years.

This paper is organized into three chapters, one for each clause, and they are arranged in the order which they appear in the Constitution. Chapter one spends the majority of its pages analyzing the debates at the Constitutional Convention over whether or not slaves should be counted for representation or taxation purposes, and if so to what extent. Different viewpoints are highlighted and the road to compromise is made clear. Attention then turns to the growth in overall population experienced by the northern and southern states in order to demonstrate how numbers in the former climbed at an incredibly faster rate than the latter, making any initial advantage the slaveholding states had in terms of representation irrelevant. Chapter two has a similar structure in that it conveys the different stances on the issue of importing slaves, and attention is paid to the threats made by the delegates from South Carolina and Georgia that their states would never ratify a Constitution that did not protect the peculiar institution to a certain extent. Once again population numbers are used to convey how these states obtained a satisfactory amount of forced laborers prior to the international slave trade being outlawed in 1808. Following that year there was an extensive internal trade which supplied any new needs, and these factors eliminated any widespread desire to have the ports reopened. Finally, chapter

three spends only a brief segment on the Constitutional Convention because the fugitive slave clause was completely dealt with in about five sentences. This lack of attention would prove to be costly, as the rest of the chapter demonstrates the various ways in which the issue created national tension over the next seventy years. Finally, in a concluding section, the various arguments of the Convention and the explanations behind the alterations in level of importance of each clause are briefly restated and connected.

# Chapter I

## Three-Fifths Clause

In the debates surrounding the formation of the United States one of the most controversial topics of discussion involved how numbers would be determined for representation and direct taxation purposes. Although it was at the forefront during the Constitutional Convention, it had been an area of concern in the decade following the American Revolution as well. Within this conversation was the question of whether or not slaves should be counted toward either of these ends, and if so to what extent. Essentially, there were three main arguments that were asserted by the founding fathers involved in these debates. The first of these was the notion that slaves were undeniably considered as property and for that reason it was ridiculous to count them in terms of apportionment of representatives. Another assertion was that these forced laborers of the South were the equivalent of the poor workers of the North. Under this line of thinking, since both groups contributed to the nation's economy, if one was to be regarded as part of the population so should the other. The third main suggestion was one that was expressed solely by men from the Mid-Atlantic and New England regions, and they stated that to count slaves toward representation was to benefit the South while placing a burden on northern states. On top of these arguments, there was a span of roughly one week during the Philadelphia Convention in which this issue was hotly debated, with a particular focus on determining the ratio with which slaves were to be counted in relation to whites. Ultimately, the delegates achieved compromise and the three-fifths clause was included in the Constitution of the United States under Article I, Section 2, which is part of the portion of the document centered on setting the framework of the legislative branch through outlining the structure of Congress.

After describing that the House of Representatives and direct taxes would be apportioned by state according to their population, it distinguishes this sum to be determined by "adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."[26] While this issue was one of major contention in 1787, it never resulted in any turmoil throughout the rest of its functionality. The population of the northern states grew at such a significantly faster rate than that of the southern states, making irrelevant any potential advantage in the House the latter may have had by counting slaves towards apportionment.

The argument that slaves should in no way be counted as part of the population for the purposes of determining representation and taxation began during the debates over the creation of the Articles of Confederation. In the midst of the discussion, Maryland delegate Samuel Chase presented his view that there should be fixed quotas based off the number of "white inhabitants."[27] He acknowledged that taxation should relate directly to property, yet believed that this could never actually be the case, so population was the best alternative. Recognizing slaves as property he went on to state that there was no more of a reason to tax a southern farmer for his slaves than to tax a northern farmer for his cattle, and that slaves "should not be considered as members of the state."[28] Elbridge Gerry used a nearly identical rationale several years later at the Constitutional Convention, yet his focus was on representation rather than taxation. This argument is found in the notes of Robert Yates, delegate from New York, in his account of the debates. He writes that Gerry objected to the proposal that the property of slaves should count towards representation through the following statement: "Blacks are property, and are used, to the southward, as horses and cattle to the northward; and why should their representation be

[26] "Constitution of the United States," *Documents of American Constitutional and Legal History*, 99.
[27] Thomas Jefferson, "Jefferson's Notes of Debate on Confederation," in Elliot, *Debates*, 1:70.
[28] Jefferson, 71.

increased to the southward, on account of the number of slaves, than horses or oxen to the north?."[29] Such words portray the realization by many delegates from the Mid-Atlantic, New England, and even Chesapeake states that it was contradictory for slave-owners to treat their slaves as property yet call for them to be considered as part of the population when it came to political representation.

Throughout the General Convention, there were other approaches taken to this position. William Patterson (Paterson) of New Jersey declared his view on whether or not slaves should be counted toward representation as he made clear that in no way could he consider slaves as anything but property through stating: "They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and, like other property, entirely at the will of the master."[30] The focus then shifted to a hypothetical situation in which representatives were not used and rather the whole population of a state got to vote on national legislation, essentially the concept of direct democracy. Patterson asserted that if this were the case slaves would certainly not have a vote, and proceeded to ask why then should they be represented? It is clear that Patterson was pointing out that the representatives would not have the interest of the slaves in mind, which essentially defeats the purpose of this body of laborers counting towards apportionment. James Madison realized the validity of this opinion, and it prompted him to suggest the idea of having one national legislative branch be apportioned by only free citizens, while the other by total number of inhabitants, yet this notion did not go far.[31] Once again, it is clear that proponents of this viewpoint recognized the severe irony of the debates that even appear mind-boggling on their face to this day. Luther Martin expressed this in

[29] Robert Yates, "The Notes of the Secret Debates of the Federal Convention of 1787," in Elliot, *Debates*, 1:406.

[30] "Debates in the Federal Convention, from Monday, May 14, 1787, Until its Final Adjournment, Monday, September 17, 1787," in Elliot, *Debates*, 5:289.

[31] Debates in the Federal Convention, 290.

a letter following the Convention, in which he questioned how slaveholders could deprive a whole group of people of their rights, yet claim that they desired to have these same individuals counted toward government representation. However, whether it was decided that slaves were to be used to determine the number of representatives for a state or not, Martin found it proper to count all inhabitants toward taxation because it would help to discourage the peculiar institution. Dr. Benjamin Rush of Pennsylvania expressed still another view that only free inhabitants should count towards apportionment because it would have the effect to "discourage slavery and to encourage the increase of their [the state's] free inhabitants."[32] While it was a slightly different approach, the general idea that efforts should be taken to discourage the institution of slavery was strongly supported by both Rush and Martin.

On January 17, 1788, at the ratification debates of Massachusetts, Rufus King brought up the three-fifths clause. While in attendance at the Constitutional Convention, he expressed discontent with the matter, and once again King asserted that it was ridiculous to think that "*five negro children* of South Carolina are to pay as much tax as the three governors of New Hampshire, Massachusetts, and Connecticut."[33] Being a strong anti-slavery advocate, it seems that King was sympathetic to the condition of the slaves and for that reason found it shocking that they would be counted towards taxation. This also hints that he was in favor of varying levels of taxation, which would be determined by social and economic status. In response to this way of looking at the compromise, Samuel Nasson urged that one could look at the clause from another angle, and that "*three of our* (Massachusetts') *infants in the cradle* are to be rated as *five of the working negroes* of Virginia."[34] From this perspective, Nasson believed that it was a good

[32] Jefferson, 77.

[33] "Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution," in Elliot, *Debates*, 2:37.

[34] Massachusetts Debates, 39.

deal for the northern states because he found it to be an appropriate balance. While these arguments are somewhat confusing, the main focus of the debates surrounding this issue was more often than not representation rather than taxation, and the provision for a direct taxation which incorporated a ratio of slaves was never utilized to any extent worthy of significance.

The second main category into which arguments concerning this issue fell was that slaves should be included as a result of the fact that they added to the wealth of the nation. John Adams, of Massachusetts, believed that this was the case because slaves were essentially the same as a poor white laborer. His rationale followed that there was no difference between a man who makes just enough money to obtain the necessities of life and one who was provided these by an owner.[35] Being the "wealth of his master" a slave should be counted for taxation purposes.[36] This notion coming from an anti-slavery advocate like Adams is somewhat surprising upon a first glance, yet he was focusing on the topic of taxation more than that of representation. It is likely that he was willing to accept slaves being counted toward the latter as long as they were measured into the former as well. While making it challenging for slave owners to continue holding such large amounts of this 'property,' Adams may have seen it as a step towards recognizing slaves as human beings because they would be acknowledged as part of the population. While the true reasoning of Adams can only be speculated, during the Massachusetts debates over ratification of the Constitution, Thomas Dawes explicitly expressed that he held this belief. He contended that Massachusetts should be glad that the "black inhabitants" of the southern states were to be considered as people and not property. Since they must be perceived as one or the other, he found it to be in line with the "ideas of natural justice" held by their state

[35] Jefferson, 72.
[36] Jefferson, 72.

for them to not be regarded as property.[37] Dawes saw this as a promising step, yet it is interesting to observe that this emphasized point of the inequality of the slaves with free, white individuals overrode any concerns he may have had regarding the increase in representation that the southern states would receive.

There were others who made similar arguments as to the production of slaves in the South, yet such men had different intentions and were supportive of the representation aspect rather than that of taxation. At the Constitutional Convention, delegates clarified that the arguments over taxation dealt only with those that were direct and that anything that was indirect, such as imports and consumption, were not worthy of debate because these categories were nearly equal throughout the states. General Pinckney played off of this statement by expressing the ironic viewpoint that to not count slaves toward representation was insulting, because in a state such as South Carolina (his home state) where the exports for one year were nearly 600,000 pounds sterling this was directly a result of the slave labor. Pinckney stated that he only found it fair to count them towards representation for these efforts. If slaves were not to be counted equally for apportionment it would be ridiculous for the legislature to be able to tax exports.[38] Clearly, there were other motives that are not stated here, for even though Pinckney claimed to want equal apportionment for the sake of the hard-working slaves it is more than likely that he simply wanted more southern delegates in the legislature to protect his material interests. Later in the discussion his cousin, Charles Pinckney, demonstrated matching beliefs on the subject when he described the notion that slaves contributed as much as anyone to the wealth of the nation because they were the peasants of the south. Since wealth directly impacts the

[37] Massachusetts Debates, 40.
[38] Debates in the Federal Convention, 302.

strength and defense of the nation, their efforts to supporting this end must be respected through proper apportionment.[39]

The third main stance taken on this issue was that to count slaves toward representation would affect the regions of the nation in drastically different ways. James Wilson made this viewpoint clear in the early discussions over the Articles of Confederation. He thought that counting slaves for apportionment purposes would strictly benefit only the southern states while the northern states would bear the burden of defense. The Pennsylvania delegate went on to argue that although freemen did work more productively than slaves they also consumed much more than those in bondage who were given only the minimum necessities to live by, which led to a production surplus by slaves yet was not the case for the labor of free individuals.[40] Such an argument was in response to that of John Adams, mentioned earlier, which held that slaves were essentially equal to the poor working class of the North. This notion continued to persist through the General Convention, as Rufus King made a similar point. King revealed that he had always expected the southern states to expect some sort of "respect" granted for their having more wealth than northerners, and he saw the desire to have slaves count towards representation as being an example of this.[41] This demonstrates that the elite, southern slave holders utilized their social and economic status as a vehicle for achieving desired methods of counting the population for representation purposes. Delegates to the Convention, such as King, were aware of this, yet there was not much that could be done with the leverage held by the southern states in that they could always threaten to simply not join the union, which was something that the majority of men greatly wished to avoid.

[39] Debates in the Federal Convention, 305.
[40] Jefferson, 72-73.
[41] Debates in the Federal Convention, 290.

Within this same line of thinking there were those who went a step further and found that counting slaves toward representation was not only to the benefit of the South and detriment of the North, but they had moral concerns about the issue as well. When writing about the debates on apportionment, Martin stated that it was urged by some at the Convention that there was no justification for counting the number of slaves toward these purposes. This was a result of the fact "that it involved the absurdity of increasing the power of a state in making laws for *free men* in proportion as that state violated the rights of freedom."[42] Going on, he said that it would also "make it the interest *of the states to continue* that *infamous traffic*" because the more slaves that were imported the more representatives the state would have.[43] Gouverneur Morris recognized the dependence of the South on the institution of slavery, yet in regards to allowing them to count slaves as part of the population he became troubled. He made this clear when he said that he had come to the dilemma of determining whether to deliver injustice to the Southern States or to human nature, and he decided to go against the former. Morris could never bring himself to agree to count slaves toward representation because it would strongly encourage the further importation of slaves, and it was a system that must end. That being said, he did not expect that the Southern States would agree to such terms. Views that were stressed in an effort to condemn the Three-Fifths Compromise, such as those above, were initially successful, and it lost in the first vote on the matter with 4 states in favor and 6 opposed.[44]

While there were three main categories of opinion on the overall question of whether or not slaves should be counted towards representation and taxation, there was at the same time a great deal of discussion as to the potential of using a ratio system. In 1783 questions on the concept of counting slaves as only a fraction of a free individual began to become more pertinent

[42] Luther Martin, "Luther Martin's Letter on the Federal Convention of 1787," in Elliot, *Debates*, 1:363.
[43] Martin, 363.
[44] Debates in the Federal Convention, 301.

within the meetings of the Continental Congress under the Articles of Confederation. On February 27, 1783, John F. Mercer of Virginia provided an outline as to his vision for representation among the states, and suggested that each slave should count as half of a free man.[45] This concept was not seriously debated again until representation was brought up a month later, on March 27. It was agreed by the members in session that these apportionments should not be determined according to age, as some had suggested, but that it needed to be a fixed number of the entire population. James Wilson, in clarifying why taxation and representation were based on land and not population in the first place, stated that he had been present when the Articles of Confederation were created, and that it had been a result of the "impossibility of compromising the different ideas of the Eastern and Southern States, as to the value of slaves compared with the whites."[46] However, the following day brought about a more specific debate on the issue of proportions of slaves for terms of apportionment, and a number of recommended figures were given. Several men suggested that the ratio should be four slaves counting as three freemen, yet there were others who asserted that the proper difference should be one to four.[47] In order to come to a compromise James Madison recommended the ratio of slaves to freemen be five to three. The motion was seconded by John Rutledge, James Wilson gave his consent in favor of compromise, and the vote passed to propose an amendment to the states which would implement such an apportionment, yet it later fell two states short of ratification.[48] Those who had been in favor of "rating slaves high" argued that they were much less expensive to feed and care for and that their "ingenuity" was inferior to others.[49] On the other side of the argument, it was the

[45] "Debates in the Congress of the Confederation, From November 4, 1782, to June 21, 1783; and from February 19 to April 25, 1787," in Elliot, *Debates*, 5:60.
[46] Congress of the Confederation, 79.
[47] Congress of the Confederation, 79.
[48] Congress of the Confederation, 79.
[49] Congress of the Confederation, 79.

opinion that slaves should be counted low because their children do not get put to work as young as the children in "laboring families," slaves are involved in labor not manufacturing, and that they did "as little as possible" because they had no interest in their work.[50]

Although the motion for a three-fifths ratio failed to be ratified under the Continental Congress, the debate would once again come to the forefront over a series of days at the Philadelphia Convention in 1787. The issue was discussed in detail on July 11 and although it had been touched upon earlier, nearly two months into the debates it became one of the first matters taken up after the general framework and structure of government had been considered. Hugh Williamson of North Carolina brought forth the notion of counting every slave as three-fifths of a freeman, and Edmund Randolph of Virginia expressed that he agreed with this proposition, as he believed that it would help to balance out representation between the different states.[51] Pierce Butler and General Charles Cotesworth Pinckney, both from South Carolina, then made it clear that they felt that slaves should be counted as equals for the purposes of representation, while there were still others such as Elbridge Gerry who insisted that three-fifths was the absolute maximum ratio that should be granted. Nathaniel Gorham of Massachusetts stated that when slaves were considered for purposes of taxation the delegates from the slave states did not wish to have blacks counted as equals, yet for representation they did. Seeing this trend, Gorham believed that three-fifths would be a just proportion. Butler then spoke out again to say that "the labor of a slave in South Carolina was as productive and valuable as that of a freeman in Massachusetts; that as wealth was the great means of defense and utility to the nation, they were equally valuable to it with freemen."[52] It was his opinion that the number of slaves should count toward apportionment. On this note George Mason asserted that he understood the

[50] Congress of the Confederation, 79.
[51] Debates in the Federal Convention, 295.
[52] Debates in the Federal Convention, 296.

basis of such arguments. He knew that slaves were valuable to the economic capabilities of the nation and that the wealth they were a major part in generating could be used to strengthen the defense of the states, yet he could not bring himself to find it fair to consider slaves as equal for representation. Mason wished to see them counted in some manner, but to consider them equal to freemen was out of the question. The first motion was taken on the idea presented by Butler of counting slaves as equal, and it was struck down with the only states voting in favor being Delaware, South Carolina, and Georgia.[53]

The conversation then turned to determining the key ingredient in terms of apportioning representation, and John Rutledge suggested that rather than focusing on number of inhabitants, wealth should be the pivotal factor. Delegate from Connecticut, Roger Sherman, refuted this by saying that population numbers should be the factor used, but that it should be subject to change by the legislative branch. In his opinion, the Constitution should define "the *periods* and the *rule* of revising the representation," yet should leave some room for the legislature to make adjustments within these bounds.[54] This notion of restricting the authority of this branch of government was unsettling to some members of the Convention such as George Read, George Mason, and James Wilson. Each of them followed by expressing that it would not be wise to set such binds and restriction on the legislature, but that they should be able to adjust the criteria for representation as they saw fit. Nathaniel Gorham agreed to some extent with Sherman in that if they could not come to a compromise at that particular time, why should the legislature be able to do so at a later point? There would continue to be biases and different ideals, so it was necessary for the Convention to fix some sort of standard.[55] The debate continued as Gouverneur Morris provided a lengthy response which essentially pointed out that if the oaths, integrity, and

[53] Debates in the Federal Convention, 296.
[54] Debates in the Federal Convention, 297.
[55] Debates in the Federal Convention, 297.

expectation of the legislature were not to be trusted in apportioning representation from time to time then there should be no government at all. Not being able to put faith in the representatives of the people would defeat the entire purpose of the system of authority that the Convention had assembled to create. Morris believed that the numbers of representation should be left to the legislature to decide periodically. James Madison delivered insight into the proceedings that had been taking place in a rejection of the statement by Morris. Madison said that any individual in a position of power cannot be fully trusted, and he desired to see a fixed proportion for representation and taxation in the Constitution, to avoid any foul play later on. Similar to the line of thinking that had been previously alluded to in the proceedings, it was a concern of Madison that the Western states would gradually become the most powerful, and to allow the legislature to change apportionment could work to that advantage while hurting the Eastern and Southern states. Finally, many had been asserting that taxation and representation should be separate, because the former was tied with wealth and the latter with inhabitants. Madison clarified that in most nations that proved to be perfectly valid as a result of consistencies in climate and opportunity, yet the variations of these elements in the United States made it impossible to separate the two. In his opinion, the inhabitants of a state directly demonstrated the wealth of the state because wherever labor yielded the most wealth was where most people would locate themselves.[56]

The day wrapped up with a more specific look into whether or not slaves should be counted as three-fifths. Rufus King put forth a warning that if slaves were to be counted in any manner toward representation it would lead to discontent among the states not holding slaves. Roger Sherman argued that while counting slaves might not be just, he was satisfied with it because South Carolina "had no more beyond her proportion than New York and New

[56] Debates in the Federal Convention, 298-299.

Hampshire." Although Georgia had more slaves than whites, the state was rapidly growing and Sherman expected that this would not remain the case for long.[57] It appears that Sherman was willing to allow for slaves to be utilized in apportioning representation as long as it acted to balance the number of legislative voices of each state. Pennsylvania delegate James Wilson was confused as to the whole argument as is made clear from the notes on July 11 which state: "Are they admitted as citizens—then why are they not admitted on an equality with white citizens? Are they admitted as property—then why is not other property admitted into the computation? These were difficulties, however, which he thought must be overruled by the necessity of compromise."[58]

As the debate continued, Oliver Ellsworth set forth a motion to have slaves be counted as three fifths for the time being so as to create a compromise, yet thought that the legislature should have the power to take a census and reapportion the numbers every certain amount of years. Edmund Randolph expressed that he agreed with the three fifths ratio, but did not want to allow the legislature to have to power to change the numbers because clearly there were such strong differences in opinion for the time being, and he did not see them as changing in the near future.[59] In a statement of his main concern with creating a set number for taxation and representation which foreshadowed what would occur less than a century later, Rufus King expressed:

> "He must be shortsighted indeed who does not foresee that, whenever the Southern States shall be more numerous than the Northern, they can and will hold a language that will awe them into justice. If they threaten to separate now in case injury shall be done them, will their threats be less urgent or effectual when force

[57] Debates in the Federal Convention, 300.
[58] Debates in the Federal Convention, 301.
[59] Debates in the Federal Convention, 303-304.

> shall back their demands? Even in the intervening period there will be no point of time at which they will not be able to say, Do us justice, or we will separate."[60]

King recognized the leverage that the southern states had, and demonstrated a grim outlook as to how there was no way of avoiding dealing with the issue of representation in a manner that appeased those states.

Once the ratio of three-fifths was ultimately agreed upon at the General Convention, the question of ratification then went to the states. Delegates to the convention in Pennsylvania were relatively quick to pass the document, yet in the time they were in session the question of apportionment was discussed. On December 3, 1787, James Wilson, who was present at the Constitutional Convention and was now one of the leading figures of the ratification debates for his home state of Pennsylvania, essentially summed up that the leading concerns revolving around the institution of slavery were the three-fifths clause and the slave trade clause, as seems to be the trend throughout the state conventions. The latter will be examined later, yet in regards to the former he stated that the young nation had attempted to base representation and taxation in proportion to the value of land, yet it soon became clear that this was inefficient and basing these numbers off the population had been recommended as early as 1783.[61] Although this method had not been adopted under the Articles of Confederation as a result of a failed ratification process, Wilson made clear that the men at the Convention had seen it appropriate to hold that such a manner of determining these numbers should now be utilized under the new government. This was basically Wilson's way of informing his peers of the rationale behind the compromise and as a way of proclaiming that it would be fruitless to not ratify the Constitution over disagreements with that particular clause.

[60] Debates in the Federal Convention, 303-304.

[61] "The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution," in Elliot, *Debates*, 2:451.

Finally, at the North Carolina Convention, William Lenoir brought up an interesting observation in terms of the military support which the state would be forced to provide in times of war. While apportionment was such an important topic of the times, Lenoir was curious as to why no one had questioned the way in which states were supposed to furnish troops for the federal army in times of war. Being that there was no provision in the Constitution, Lenoir assumed that the proposed three-fifths clause would also apply to the armed services. In stressing his point, Lenoir explained that North Carolina had 100,000 blacks. If a northern state had 60,000 whites, North Carolina would have to send as many black troops to war than said state would have to send entirely and a percentage of the white population as well. This led him to the conclusion that such a manner of determining population for taxation and representation, when applied to the military as well, caused slaves to weaken a state rather than strengthen it.[62] Although this argument is used nowhere else, it is interesting to find that Lenoir found the three-fifths clause to somewhat discourage the holding of slaves.

There were a variety of opinions as to whether or not slaves should be counted toward apportionment in the House of Representatives and for purposes of direct taxation that were expressed in the critical years from 1777 through 1789 when the United States framework was being created. More often than not, it was the men from southern states such as South Carolina and Georgia who desired to have slaves be counted on an equal footing with freemen, although they were not fond of the taxation aspect of such a provision. On the other hand, members of New England and the Mid-Atlantic states generally believed that to count slaves toward the political voice of the South would be utterly ironic because slave holders considered their slaves as property. States such as Virginia, which was located in the Chesapeake region, tended to find a middle ground as a result of their owning a lot of slaves but also having a large population of

[62] "Convention of North Carolina," in Elliot, *Debates*, 4:205.

free individuals. To count slaves toward representation would strongly encourage the further importation and cultivation of blacks toward this system, which was one that most Virginia delegates did not wish to see expanded.

After South Carolina and Georgia threatened that would never agree to form a union with the other states within which they would not gain seats in the House of Representatives through counting slaves toward their apportionment, attempts at compromise on the issue sprang forth. Ultimately, the decision to settle on the Three-Fifths Compromise as formally presented by James Wilson and Roger Sherman took place at the Constitutional Convention, and was installed into the first Article of the United States Constitution. Although many men disagreed with this concept on both ends, the northern and southern states believed that to become unified as one nation would be beneficial for purposes of defense, economy, and expansion. For the time being, sectional differences over slavery were not worth the risk of failing to ratify the Constitution, and it would have to be dealt with at a later date.

Interestingly, this item which had largely been make-or-break in terms of coming to an agreement over the Constitution at the time of its framing was never of any serious issue following ratification. Whether it had been anticipated by some of the founders or not, the northern states where slavery was abolished or minimally used grew in population at a rate that far outweighed that of the slaveholding states. At the time of the General Convention, the overall population of the states holding a large number of slaves was nearly identical to that of the more northern states. This is made clear through the United States Census of 1790, in which the populations of Delaware, Maryland, Virginia, the Carolinas, and Georgia summed up to be 1,797,187. The remainder of the original thirteen states (Pennsylvania, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, and Massachusetts) recorded in the same year

had a combined overall population of 1,785,213.[63] While these numbers are nearly identical, the reason why many of the southern delegates desired to have slaves count toward representation was because when the number of blacks on record is deducted from those states the population drops to 1,128,768, whereas for the northern states the change is hardly worth mentioning. These figures shed light on why the three-fifths clause was such a topic of contention during the time of its creation.

Over the next seventy years, the boom in population in the non-slaveholding states was so dramatic that even if each slave counted as a whole individual rather than three-fifths of one the northern states would still have held much greater representation in the House. By 1820 the total population of the six slaveholding states mentioned previously had increased to just below three million, yet that of the seven more northern of the original thirteen states was nearing four million. The next few decades saw even more drastic changes, and by 1860 the numbers became staggering. Still only including the same thirteen states, the slaveholding regions had reached a total population of 4,772,511. Of that number 1,960,061 were black, which means that they were more than likely held in bondage. As for the northern states included in this original group, the population had skyrocketed to 9,650,891. With slavery having been made illegal in each of these states the total number of blacks, a mere 153,965, were all free. The urban growth and industrial developments of the northern states created extensively more job opportunities, which attracted a greater number of individuals. For the most part, besides those involved in the slave industry there were hardly any options down south, which partially accounts for this tremendous difference in population.[64]

[63] Michael R. Haines, ed., "State Populations," in *Historical Statistics of the United States: Earliest Times to the Present*, Millennial Edition, Vol. I, Part A: Population (New York: Cambridge University Press, 2006).

[64] Haines, ed., "State Populations," in *Historical Statistics of the United States.*

At the General Convention the question on the relationship of slaves to representation and direct taxation was of great importance. Some delegates strongly believed that there was no doubt that slaves were considered as property to their owners and for that reason it was an absurd suggestion to count them towards apportionment. Others argued that these individuals were essentially the equivalent of the poor laboring class of the northern states, which entitled them to be included as part of the population. Still many possessed the view that counting slaves toward apportionment would encourage the institution to expand and place an increasing burden of defense on the states that were uninterested in growing their slave populations. Following the compromise on the ratio of three-fifths this issue quickly faded into irrelevancy. The North developed at an astoundingly faster rate which correlates with the population far outweighing that of the South as the nineteenth century progressed.

# Chapter II

## Slave Trade Clause

Article I, Section 9 which prohibited Congress from interfering with the slave trade until the year 1808, was another of the tremendously controversial slave-related clauses of the Constitution. It was inserted into the portion of the document which outlines the powers of Congress. One of these abilities was regulation of commerce, making the slave trade clause a blatant limitation of this authority. Taken out of context the intention of the provision may not be immediately clear as seen from the text: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight…."[65] Although such explicit words as 'slave' were withheld, it was understood that it referred to individuals that were to be held in bondage and used for forced labor because it includes the word 'importation.' Further insight into the clause is revealed through examining the debates between the men who developed this section, in which the true meaning was not confined. By the time of the Philadelphia Convention a large number of states had already abolished further importation of slaves, including Virginia which had the greatest population of these individuals, yet there were two states that insisted that the national government should not have the power to declare an end to the trade: South Carolina and Georgia. Largely a result of the efforts of the delegates from these states, the provision was granted and compromise was made with Congress having the ability to levy a duty of up to £10 on each slave that was brought into the nation as well as the right to abolish the trade beginning in 1808. The process of coming to such an agreement was not an easy one, and discussions

[65] "Constitution of the United States," in *Documents of American Constitutional & Legal History*, 102.

among the various states during the ratification process made this a major area of focus as well. Yet just as in the case of the three-fifths clause, this provision created no serious tension once it had been ratified. South Carolina and Georgia were able to import such a large quantity of slaves prior to 1808 that Congress shut down the international trade of this kind at their first opportunity, without opposition. Slaveholders continued to remain content in the years that followed the closing of the ports because of an extensive internal trade system and the naturally increasing slave population resulting from reproduction.

There were three main categories for delegates both on the national and state level in regards to their stances on Article I, Section 9: those opposed, those who put personal beliefs aside in favor of what they considered best for the nation, and those who insisted on the continuation of the trade. In regards to the first category, these delegates put forth three main arguments as to why they found fault with the clause. First, these men asserted that it was ridiculous for Congress to be prohibited from taking action in this area until 1808, and at that point it was unlikely that they would do such a thing. The second notion was that the further importation of slaves would make the nation more vulnerable and weak. Those holding to the third stance were unnerved by the cruelness and immorality of the trade and the system it promoted. While there was clearly opposition to the clause, there were others who took a different approach. Whether they were against the slave trade in their own minds or simply indifferent, they put these personal notions aside in an attempt to look at the circumstance in the most positive light possible. There were two main ways the delegates went about this: either to view it as a step in the right direction because there had never before been even the possibility of a national abolition, or to recognize that without allowing the importation of slaves to continue there would be no unity between all the states under one central government. Finally, the only

individuals who openly favored this portion of the Constitution were delegates from South Carolina and Georgia, with the former being most influential in making clear that a lack of protection for the slave trade was something they could not do without.

One of the major areas of concern over the slave trade clause was that it was the only restriction on Congress in their regulation of commerce. Luther Martin, delegate from Maryland, cited this section of the document as being one of the reasons he left the General Convention and refused to sign. In a letter to the Speaker of the House of Delegates in his home state, he stressed that it was ridiculous that such a provision was to be implemented when in reference to the power of Congress over commerce he wrote: "…it must therefore appear to the world absurd and disgraceful, to the last degree, that we should except from the exercise of that power the only branch of commerce which is unjustifiable in its nature, and contrary to the rights of mankind."[66] Clearly, such a distinction rightly deserved such questioning as the founding document of the nation explicitly withheld the legislative branch from interfering with the human traffic. Along the same lines was the concern expressed by Rufus King at the Philadelphia Convention that if the slave trade was going to be protected there should at least be a limit on the number of individuals that were to be imported. On top of this, he found more fault with the lack of a provision for exports to be taxed. Without one, or preferably both, of these assurances it was King's belief that production and importation would have no limits.[67]

Another gloomy yet realistic concern was that the year 1808 would not necessarily bring with it the abolition of slave importation. This issue came up at the Ratification Debate of New Hampshire when Joshua Atherton spoke his mind before the other delegates. He thought that the state should not pass the Constitution as long as it protected slavery and warned that even in

[66] Luther Martin, "Luther Martin's Letter on the Federal Convention of 1787," in Elliot, *Debates*, 1:374.

[67] "Debates in the Federal Convention, from Monday, May 14, 1787, Until its Final Adjournment, Monday, September 17, 1787," in Elliot, *Debates*, 5:391.

1808: "Congress may be as much, or more, puzzled to put a stop to it then, than we are now. The clause has not secured its abolition."[68] This highlights the subtle fact that Article I, Section 9 does not state that Congress 'must' or 'will' put an end to the trade, rather it simply says that they will not be able to alter it until a twenty-year period has passed. This lack of a guarantee was observed by Luther Martin as well. Not only did he express concern, but he even went so far as to write that it was his belief that if the slave trade were to continue until 1808 it would not be abolished afterwards.[69] These doubts were certainly not unwarranted, for if the slave trade was such a major point of contention in 1787 who was to say that twenty years more utilization of the system would make it any easier for those who desired to import slaves to part with it? Interestingly, both Atherton and Martin happened to be on the same page in regards to this issue as a delegate to the ratification debates of South Carolina. Robert Gibbes Barnwell expressed to his peers that they should not be upset over the potential for Congress to interfere with the slave trade in 1808 because it did not require that such actions would take place. According to Barnwell, unless South Carolina was to end the importation of slaves on their own, "…the traffic for negroes will continue forever."[70] With a twenty year window in which to operate, Barnwell believed that the production and exportation of states using slave labor would greatly benefit the nation, and that the states would realize this and not abolish the trade.

Another argument made against the provisions of the slave trade clause was that increasing the number of slaves within the states directly increased the amount of risk which the nation faced. The main proponent of this viewpoint was George Mason, delegate from Virginia to the Constitutional Convention. In much the same way as Martin, Mason refused to sign the

[68] "New Hampshire Convention," in Elliot, *Debates*, 2:203.
[69] Martin, 374.
[70] "Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution," in Elliot, *Debates*, 4:297.

Constitution and wrote a letter stating his reasons for the same. In his explanation he pointed out that he found fault with the slave trade clause because "such importations render the United States weaker, more vulnerable, and less capable of defence."[71] This was a reiteration of what he had explained to his peers at the Convention during the month of August when he cited a variety of reasons as to the danger of further importation. Mason stated that had the British army utilized the slaves of the colonies in the manner that he believed they could have then it would have been devastating for the Revolution. Going on he described how other cultures, namely Sicily and Greece, had experienced violent insurrections. Following these warnings, Mason stressed that states such as Virginia and Maryland had taken the steps to abolish the trade into their ports, but that if South Carolina and Georgia were to continue the traffic then the efforts of these other states would be defeated. The westward expansion of the nation and the desire of the settlers of these new lands to have slaves meant that as long as these two states were permitted to continue importing them, slaves would be sold throughout the country. On top of all this, Mason believed that slave labor discouraged poor individuals from working because they did not want to be hired for similar tasks to what slaves were subject to. This in turn led to a decrease in the immigration of whites, which the Virginia delegate thought was the true way to strengthen the nation.[72]

A similar viewpoint was held by fellow delegate and Governor from Virginia, Edmund Randolph, who discussed the issue during the ratification debates of his home state. It was his belief that if any states continued to import slaves there would be more and more of these individuals being funneled into his home state. Randolph acknowledged that such activity would add to the weakness of the Virginia every day, and while he wanted the peculiar institution to

[71] George Mason, "Objections of the Hon. George Mason, One of the Delegates from Virginia in the Late Continental Convention, to the Proposed Federal Constitution; Assigned as his Reasons for not Signing the Same," in Elliot, *Debates*, 1:496.

[72] Debates in the Federal Convention, 458.

continue he did not wish for the importation of slaves to be allowed.[73] The reason for such concern by the men from Virginia resulted from their state having the largest population of slaves at the time. They recognized the potential threat of a widespread insurrection and for that reason wanted to prohibit further increase in the slave population. While an aura of danger came with these large numbers, there was at the same time a benefit. Such a vast population led to a lot of reproduction, which provided slaveholders with a continued supply of labor. General Charles Cotesworth Pinckney of South Carolina recognized that Virginia's aversion to the slave trade stemmed from simple supply and demand market principles. If the Trans-Atlantic Slave Trade were to be abolished then the value of the slaves from Virginia would increase, and slaveholders residing within that state would be able to make large profits through selling to other states.[74] The delegates from Virginia were mostly concerned with the safety and interests of their own region, yet from an outside perspective it was recognized as a burden for the rest of the nation. Luther Martin argued at the General Convention that all states which utilized slavery weakened the nation and that the rest of the states were obligated to protect them. As a result, any further importation of slaves was simply unfair to those states which abstained.[75]

The third most common argument against the prohibition of Congress to interfere with the slave trade for twenty years was that it was an inhumane process that was highly immoral. This notion was greatly stressed in the ratification debates of Massachusetts, in which various delegates spoke their mind on the matter. One delegate stated that he would never be able to put his hand to something that made "merchandise of the bodies of men," and that unless the clause

[73] "The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution," in Elliot, *Debates*, 3:269.

[74] Debates in the Federal Convention, 459.

[75] Debates in the Federal Convention, 457.

was removed from the Constitution he would refuse to ratify.[76] Such words evoked General Thompson to exclaim his shock that even though George Washington was "immortalized" the fact that he continued to hold slaves dropped his character by fifty-percent.[77] This notion was observed in the New Hampshire debates when the delegates were strongly urged not to ratify the Constitution because doing so would make them accomplices in "the sin and guilt of this abominable traffic."[78] Such concerns were echoed by George Mason during the Philadelphia Convention. He warned those present that nations are punished for their misdeeds and that if the states were to continue on this path through increasing slavery they would bring the "judgment of Heaven" upon themselves.[79] Others attempted to emphasize their concerns with the immorality of the trade through tapping into the emotions of their peers. Major Lusk gave a vivid, heart-wrenching description of Africans who were kidnapped from their homes and sold into the horrible, miserable world of slavery.[80] Although these arguments against the immorality and cruelness of the trade and slavery as a whole are extremely convincing today, at the time of the founding they were not nearly as effective.

Related to the above views was the notion that the importation of slaves and the system it promoted were a stark contrast to the ideals upon which the nation was to stand. General Thompson was baffled as to how slavery could be provided for in the Constitution considering the principles under which the Revolution was fought.[81] This paradox upset Luther Martin as well, and he made this clear in speaking at the General Convention. Not only did he find it to be a strong inconsistency with American values, but Martin saw it as a stain on the character of the

[76] Massachusetts Debates, 107.
[77] Massachusetts Debates, 107.
[78] New Hampshire Convention, 203.
[79] Debates in the Federal Convention, 458.
[80] Massachusetts Debates, 148.
[81] Massachusetts Debates, 107.

nation.[82] Opinions such as this are hard to look past considering the importance of the concepts of equality and natural rights that are found in the Declaration of Independence and were a driving force behind the desire to break away from England; a country that did not allow slavery within its borders. To gain freedom and then to write a founding document which protected the peculiar institution was mind-boggling to a great number of people. John Dickinson of Delaware was one such individual, and at the Federal Convention he made clear his belief that to have the importation of slaves protected in the Constitution was absurd. The fact that even though Great Britain and France permitted slavery in their territories but would not allow it in the homeland was a sign that Dickinson wanted the other delegates to be aware of. In developing the founding document he stressed that it should be taken into account what will make the citizens happiest, and continuing to promote slavery was not in their best interest.[83]

Just as there were a variety of arguments against Article I, Section 9, of the Constitution, there were others who decided to take the position of looking at it from a broader perspective in an effort to see things in the most positive light possible. Reverend Isaac Backus was a supporter of this line of thinking as seen through his statements at the debates over ratification for Massachusetts. Making it a point to declare that he was the most opposed to slavery out of any man in the nation, he then requested that his peers look at the context within which they were hoping to rid the country of the institution. Reverend Backus believed that they should count their blessings by recognizing that the Articles of Confederation contained no provisions in regards to slavery, and now under the proposed Constitution there was at least the assurance that in 1808 the national government could potentially abolish the importation and that for the time being each state could decide individually. On top of this Reverend Backus asserted that "slavery

[82] Debates in the Federal Convention, 457.
[83] Debates in the Federal Convention, 460.

grows more and more odious through the world."[84] It was his view that, in one way or another, the institution of slavery would fade out within the United States in one way or another. This opinion was shared with his fellow delegate, Thomas Dawes, who in response to those objecting to the slave trade clause asserted that the Convention had done as much as they could in regards to this subject. To abolish the slave trade or the institution as a whole would hurt their "southern brethren," but the steps that had been taken had provided a blow to slavery and it would eventually "die of consumption."[85] Other delegates to the Massachusetts debates over ratification shared in this notion, and some went so far as to say that the slave trade clause was one of the best portions of the Constitution because it provided grounds for future, total abolition of the importation of slaves. There was a trust that each individual state would soon prohibit the traffic on their own, making it possible for it to be obsolete prior to 1808.[86]

Another position taken by those who were willing to accept the slave trade clause was that it was a necessary compromise in order to form a union. Delegates to the ratification debates of North Carolina talked extensively about this issue as a result of their being on the fence concerning the matter. Richard Dobbs Spaight explained to his peers that there had been a "contest between the Northern and Southern States" at the Convention.[87] The former had desired to see the importation of slaves removed completely while the latter depended on slave labor in order to survive. Spaight mentioned that South Carolina and Georgia had insisted on having the clause included in the document because they needed to enlarge their supply of slaves, and that twenty years would be sufficient to meet this need. Resulting from the fact that North Carolina had not yet abolished the slave trade within their own state, Spaight and his fellow delegates to

[84] Massachusetts Debates, 149.
[85] Massachusetts Debates, 41.
[86] Massachusetts Debates, 107.
[87] "Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution," in Elliot, *Debates*, 4:100.

the Convention believed that they were unauthorized to side with the North in favor of total prohibition.[88] In support of this information, James Iredell said that the majority of the nation as well as the delegates in Philadelphia would love to see the slave trade abolished, but South Carolina and Georgia would never agree to it. Although it was a minimum of twenty years away, he thought it a tremendous achievement that any sort of provision for ending the importation of slaves on a national level had been included in the founding document.[89] It is clear from reviewing these opinions that the compromise found in the slave trade clause was put in place in order to greatly strengthen the chance of unifying the states. Refusing to appease South Carolina and Georgia in at least some fashion would have certainly resulted in a failure of those two states to ratify the Constitution.

There was another state whose delegates to the General Convention held the position that it was much more pertinent for the founding document to be ratified rather than to worry about the issue of the slave trade. Two of the delegates from Rhode Island made it a point to speak out on this matter, beginning with Roger Sherman. He expressed his opinion that since it was not required to ensure the public good that the importation of slaves be stopped and because states already had the right to prohibit the trade if they so desired, they should do no more than what was found in the clause as it currently stood. Sherman went on to state that slavery seemed to be on its way out already, and it was only a matter of time before it vanished. With these considerations in mind he believed that the Constitution should be made to be ratified quickly, as unity was essential.[90] Fellow delegate, Oliver Ellsworth, conveyed his opinion that if they abolished the slave trade outright then they "ought to go further, and free those already in the

[88] Debates in North Carolina, 101.
[89] Debates in North Carolina, 100-101.
[90] Debates in the Federal Convention, 457-458.

country."[91] He made the point that Virginia and Maryland did not need the importation of slaves because they reproduced so quickly in those states that it would be a waste of money to continue in the international trade. As for South Carolina and Georgia, they needed to continue importing, so anything preventing that would injure those two states alone.[92] It is interesting to note that, other than South Carolina and Georgia, the two states that were most outspoken in terms of wanting to prevent the harm of these states and desired to leave the clause in the final draft of the Constitution to ensure a speedy ratification were North Carolina and Rhode Island. The former borders one of the states that would continue importing, so if they desired to buy any slaves it would not be difficult for them to do without needing to open their own ports. As for Rhode Island, they had been heavily involved in the slave trade in the years leading up to the Convention, and if they had interest in reopening their ports in order to again profit off of such traffic they would need to avoid a national abolition of the trade.

The final major stance taken on the issue of the slave trade provision existing within the Constitution was insisting that protection against a national abolition, at least for a time, be granted. Those who argued on behalf of this position were the delegates from South Carolina and Georgia, with the former being at the forefront of the debate. What went on behind the closed doors of the legislative debates of South Carolina presents the rationale behind the strong position taken by the delegates of that state at the Constitutional Convention. Rawlins Lowndes essentially provided a summary to this as well as his reaction to the slave trade clause as seen in this transcription taken during his statement:

> "Without negroes, this state would degenerate into one of the most contemptible in the Union; and he an expression that fell from General Pinckney on a former debate, that whilst there remained one acre of swamp-land in South Carolina, he should raise his voice against restricting the importation of negroes. Even in

[91] Debates in the Federal Convention, 458.
[92] Debates in the Federal Convention, 458.

> granting the importation for twenty years, care had been taken to make us pay for this indulgence, each negro being liable, on importation, to pay a duty not exceeding ten dollars; and, in addition to this, they were liable to a capitation tax. Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!"[93]

The sheer dependence on the institution of slavery in that particular state is made clear through such a statement. Climate and landscape made the settling of South Carolina tremendously difficult, and it was even more challenging to develop an economy. In the eyes of many the use of forced labor for purposes such as growing and harvesting rice was the only way in which the state could be of any worth. These circumstances led the delegates to the Constitutional Convention to be unrelenting on the issue of the slave trade.

While they had made it clear throughout the Convention, towards the end of August when discussions on the slave trade clause began to become increasingly heated, South Carolina and Georgia began to be explicit on their position. Charles Pinckney, cousin of General Charles Cotesworth Pinckney, told the other delegates that South Carolina would never be able to ratify anything that prohibited the importation of slaves. He went on to state that he and the other delegates from his home state had been keeping their eye on all powers that were being given to Congress in order to be sure to avoid anything that would interfere with the institution. That being said, Pinckney declared that if the states be left alone to make their own decision on the matter, over time his state may decide to abolish the trade.[94] As the debate continued the following day, General Pinckney elaborated on what his cousin and fellow delegate had stated previously. In order to demonstrate just how impossible it would be to have the Constitution ratified by South Carolina without a protection for the slave trade he remarked that he firmly believed that even if he and the other delegates were to sign the document and using their

[93] Debates in South Carolina, 272, 273.
[94] Debates in the Federal Convention, 457.

"personal influence" upon returning home, the rest of their peers would refuse to ratify it.[95] Such undeniable statements did not bring an end to the debate, and seemingly irritated at this John Rutledge of South Carolina further stressed the point: "If the Convention thinks that North Carolina, South Carolina, and Georgia, will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those states will never be such fools as to give up so important an interest."[96]

Whether in an attempt to sway the disagreeing delegates, an expression of true personal beliefs, or a combination of the two, there were two intriguing arguments made by the delegates from South Carolina as to how the importation and enslavement of Africans was justifiable. Charles Pinckney responded to claims that slavery be immoral through the suggestion that if it was considered wrong, it had been "justified by the example of all the world."[97] Going on, he cited various examples in an effort to make the point that half of the population of the world has always been a slave throughout history.[98] Although this was a gross overstatement, he was correct to the extent that slavery has existed on different levels for the majority of time. General Pinckney sought to provide rationale for the institution from an economic standpoint. To be sure, permitting South Carolina to indulge in the traffic would lead to more production, more trade of goods, and more consumption. This, in the eyes of Pinckney, would then add "more revenue to the national treasury."[99]

Perhaps as a result of the delegates of South Carolina being extremely vocal or maybe some other reason, the Georgia delegates to the Constitutional Convention were much quieter in the debates over the slave trade clause. However, in a statement from Abraham Baldwin, an

[95] Debates in the Federal Convention, 459.
[96] Debates in the Federal Convention, 460.
[97] Debates in the Federal Convention, 458-459.
[98] Debates in the Federal Convention, 459.
[99] Debates in the Federal Convention, 459.

intriguing viewpoint is expressed. Baldwin explains that it was his understanding that the gathering was to deal with issues that were of a national scale. It was the opinion of Georgia that slavery and the slave trade "were of a local nature."[100] His home state had been suspicious that the central states desired to create a national government so that they could "have a vortex for every thing," and being far from this middle-region Georgia would then be at a disadvantage.[101] In light of this, Baldwin believed that it should come as no surprise that he would see an attempt at abolishing the slave trade as being an effort to further remove Georgia from having power within the national government. Just as the delegates of his neighboring state had declared, Baldwin expressed that if the question of the slave trade be left up to the states, Georgia might bring an end to the cruel system of importing slaves.[102] Although the argument was for the most part unique in comparison with that of South Carolina, the bottom line was clear – if the issue of the slave trade was not protected from abolition by Congress and the question was not left to the states, the southernmost entities would not join the union.

Most scholars on this subject tend to convey the similar opinion that South Carolina and Georgia would have acted on the threats they made at the Convention had the slave trade not been permitted or the system protected by certain provisions within the Constitution, yet it is worth mentioning the differing opinion of Gary B. Nash on this subject. In the book *Race and Revolution*, Nash refutes the notion that these states would have refused to ratify the Constitution if the peculiar institution had not been protected within it. The author claims that these two southernmost states were too weak to not join the union; namely as a result of their vulnerability through being so close to the Creek confederacy and Spanish-inhabited Florida.[103] South

[100] Debates in the Federal Convention, 459.
[101] Debates in the Federal Convention, 459.
[102] Debates in the Federal Convention, 459.
[103] Nash, 27.

Carolina and Georgia needed the rest of the states in order to survive to a much greater extent than did the rest of the states need South Carolina and Georgia, asserts Nash, and for these reasons the threats made by the delegates from these locations at the Constitutional Convention were essentially empty. This is certainly a valid argument, as the dangers that would have been faced by the two states had they failed to join the union would have been tremendous. However, any opinion on the situation consists of speculation, as slavery was protected within the document and the southernmost states did ratify. Whether one holds the notion that the two states would have lived up to their threats or shares in the opinion presented by Nash, the bottom line is that the claims made by South Carolina and Georgia at the Convention were sufficient enough to ensure that their demands were met, and it was never revealed whether they would have actually acted upon them or not.

Ultimately, South Carolina and Georgia got what they wanted with the slave trade clause, but it came after a great deal of debate. For being a topic of such intense argument in 1787, it may be surprising that it posed no major problems in the years following the ratification of the Constitution. From 1789 until 1808, Congress was prohibited from doing anything to interfere with the traffic, so there was not much that could be done even if it had been desired. At the end of that period the legislative branch enacted its powers and ended the legal importation of slaves into the United States, yet even this did not cause controversy. This had much to do with the fact that during the roughly twenty-year window in which the international slave trade was untouched the states of South Carolina and Georgia successfully imported enough individuals to meet the satisfaction of their slaveholders. South Carolina alone brought in around 100,000 slaves through its ports during this timeframe and the population of forced laborers within these states had

climbed extensively.[104] According to the census records, the black population in this state nearly doubled from just below 110,000 in 1790 to 200,919 by 1810. Georgia experienced similar changes in demographics by growing from a population of roughly 30,000 blacks to 107,019 during the twenty-year span.[105] While it is not stated whether or not these individuals were slaves, it is safe to assume that the overwhelming majority of them were not free. Such major increases make clear the immense undertaking in regards to utilization of the international slave trade before it was outlawed.

Not only did the efforts between 1787 and 1808 help to limit any further debate over the issue of importing slaves, but the vast amount of internal traffic of this kind played a key role as well. As the population of slaves grew so did the levels of reproduction, which essentially created a self-sustaining supply of labor for many slaveholders. For others, excess numbers were achieved and the domestic slave trade began to take-off. This was especially true of the Chesapeake Region, namely Virginia, as the number of slaves in that state was almost beyond what could be maintained. In the decade following the end of the ability to legally import slaves into the United States it is estimated that around 120,000 slaves were transported to the West and South from this region of the nation, and Georgia was one of the main recipients.[106] With the widespread availability of new laborers, there was no pressing reason for the states to call for a re-opening of the coastline for importing slaves. In fact, South Carolina and Georgia were able to achieve such high numbers by the 1830s that instead of constantly wanting more these states "each forwarded nearly 100,000 slaves" to Alabama and Mississippi.[107] Not only was this an interstate traffic, but slaves were commonly sold from city to city, town to town, or region to

[104] Ira Berlin, *The Making of African America: The Four Great Migrations* (New York: Viking Penguin, 2010), 70.
[105] Haines, ed., "State Populations," in *Historical Statistics of the United States.*
[106] Berlin, 103.
[107] Berlin, 103.

region within the same state.[108] With the ability to obtain new laborers being readily available at home, there was no longer a widespread lust for the international slave trade. It is clear that up until 1808 there were no major controversies on the issue because it had already been agreed to in the Constitution, and following its end in 1808 slaveholders had little reason to call for a reopening.

The extensive network of the domestic slave trade was never seriously considered as something that Congress would attempt to limit or terminate. This is an action that the legislative branch certainly had the power to do, for in Article I, Section 8 they are granted authority over interstate commerce. Perhaps Congress did not want to upset those involved with the system and potentially provoke them to call for the ports to be reopened for importation, or the tremendous obstacle of enforcing such a regulation seemed overwhelming, but for one reason or another this power never came close to being exercised. If this had occurred there is the possibility that issues surrounding the slave trade clause would have been aroused and tension would have ensued, yet this simply was not the case. While the debates of 1787 demonstrated that there were those severely opposed to the traffic, those who put their personal beliefs aside in order to do what they perceived as best for the nation, and others who absolutely insisted on its protection, this provision proved to provide no serious level of turmoil in subsequent years.

[108] Berlin, 105.

# Chapter III

## Fugitive Slave Clause

In regards to the questions surrounding slavery at the time of the Constitutional Convention, the main debates focused on the two issues discussed in chapters one and two: the three-fifths clause and the slave trade clause. As made evident, among the framers there were a wide variety of strong opinions on each of these topics, and coming to compromise was no simple task. In contrast, the third main provision of the Constitution concerning slavery was not even debated. Article IV, Section 2, or what is commonly referred to as the fugitive slave clause, was essentially thrown in as an afterthought while the finishing touches were being put on the founding document of the United States. While no form of the word 'slave' is included in the actual text, it is quite obvious that the clause is in reference to runaways as it reads: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[109] Within the portion of the document in which it is included this provision is practically hidden as it is located between Section 1 which grants "Full Faith and Credit" to the states in regards to records of public acts and judicial proceedings and Section 3 which outlines the process by which new states shall be admitted into the union.[110] Such a brief statement that saw no debate among the founding fathers proved to be the most controversial of the three slave-related clauses

[109] "Constitution of the United States," in Melvin I. Urofsky and Paul Finkelman eds., *Documents of American Constitutional & Legal History: Volume I, From the Founding to 1896*, 3rd ed., 105.

[110] "Constitution of the United States," in *Documents of American Constitutional & Legal History*, 105.

in the years immediately following the General Convention and peaking during the antebellum period. It was the basis of two national laws passed by Congress, one of the major U.S. Supreme Court cases of the nineteenth century, and it assisted in increasing the sectional tension between the northern and southern states.

The Philadelphia Convention lasted from May 14 – September 17, 1787, and nearly every provision of what would become the Constitution was debated for a considerable amount of time, yet discussion of the topic of fugitive slaves was completely taken care of by the delegates in a matter of a few moments. On August 28, South Carolina delegates Pierce Butler and Charles Pinckney asserted that in regards to an article involving individuals who had committed a crime it should be added that "fugitive slaves and servants [are] to be delivered up like criminals."[111] This demonstrates the opinion of slaveholders that a runaway slave should be treated in the same manner as a criminal, and they sought to use such rationale as insurance against the loss of their human property. James Wilson of Pennsylvania found fault with this proposition because he opposed the idea of the states being forced to use expenses to ensure the return of fugitive slaves. The only other opinion offered in response to the suggestion came from Roger Sherman of Connecticut, who stated that he "saw no more propriety in the public seizing and surrendering a slave or servant than a horse."[112] As made clear through these two simple statements, these delegates saw it as an annoyance for the northern states that they should be forced to utilize time, effort, and resources in order to support slavery. Perhaps wanting to avoid an in-depth debate on the suggestion or simply recognizing that using the word 'slave' was an

[111] "Debates in the Federal Convention, from Monday, May 14, 1787, Until its Final Adjournment, Monday, September 17, 1787," in Elliot, *Debates*, 5:487.
[112] Debates in the Federal Convention, 487.

error, Butler withdrew his proposition for the time being in order to attempt to insert the provision somewhere else in the document.[113]

It did not take long for Butler to find this opportunity. The following day, August 29, the South Carolinian declared his revised version of the proposition. The word 'slave' had been omitted, and it was nearly identical to the wording of the clause as it was phrased upon being written into the Constitution. Unlike the previous attempt, no one spoke out against it (or in support of it), and it was agreed upon unanimously.[114] There are several possibilities as to how the fugitive slave clause was hardly of any concern, and what little there was had only been mentioned briefly, and then ceased to be expressed upon a second effort by its supporters. It may be that the delegates did not find it to be an issue significant enough to spend time on in comparison with the other matters that were at hand. In the overall scheme of attempting to found a nation it may not have seemed to make much of a difference whether or not runaway slaves were to be returned. Another potential reason for the lack of discussion is that to southerners it was a supposed guarantee that if they lawfully reclaimed a fugitive slave it was to be returned to them, while to northerners they did not need to do anything more than comply with such an event. Still another possibility is that the delegates had grown tired of struggling to draft the Constitution throughout the course of over three months, and would rather approve of what they saw as a minor detail than lengthen the duration of the Convention. Finally, the view that slaves were inferior and incapable of any serious attempt to create change contributed as well.

Such reasoning behind the lack of attention paid to the provision may very well have played a role, yet the most significant argument that can be made pertains to the Northwest

[113] Debates in the Federal Convention, 487.
[114] Debates in the Federal Convention, 492.

Ordinance of 1787. As the Constitutional Convention was taking place the Congress of the Confederation was continuing to function. On July 13, 1787, this body passed the ordinance which outlined the regulations for the territories as well as the requirements that must be met for states to be formed and join the Union. The portion that helps to better understand the lack of reaction to the fugitive slave clause is found in Article 6, which outlaws slavery in the territories. It goes on to provide that anyone "from whom labor or service is lawfully claimed in any one of the original States" may be reclaimed and returned.[115] With this provision being created while the General Convention was in session, it is safe to assume that it played a role in limiting the discussion on the inclusion of such in the Constitution. Although it is impossible to know what went on behind closed doors or was not included in the notes that were made public, there is even the likelihood that there was an overreaching agreement among the delegates to compromise over the Northwest Ordinance and Constitution, as some scholars have suggested.[116]

As pointed to in the chapters on the three-fifths clause and slave trade clause, had it not been for those two compromises it is likely that the Union would never have formed, or at least not one that included all thirteen of the original states. While there is evidence for this argument contained within the debates that took place, such as the delegates from South Carolina blatantly expressing that their state would not join a Union that did not protect the slave trade, such assertions cannot be made in reference to the fugitive slave clause. There was hardly a discussion on the issue, no threats were made as to the necessity of such a provision, and there was not even an attempt at compromise. Taking this into consideration it is clear that it was nothing more than

[115] "The Northwest Ordinance," in *Constitutional & Legal History,* 91.

[116] Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution*, 2nd ed. (New York: Cambridge University Press, 2009); Alfred W. Blumrosen and Ruth G. Blumrosen, *Slave Nation: How Slavery United the Colonies and Sparked the American Revolution* (Naperville, Illinois: Sourcebooks, Inc., 2005).

a last-minute desire of certain southerners and was not given much thought by northerners. It is highly ironic to note this observation because, out of the three pivotal arguments involving slavery that were present when the founding fathers drafted the Constitution, the two that were essentially make-or-break issues in 1787 would barely be of any concern on a national scale throughout the duration of their existence, while the one that was overlooked proved to be by far the most controversial. To put it another way, the two topics that were hotly debated in order to avoid and limit controversy and provide unity were undermined by the provision which the founding fathers never perceived as generating serious tension. Factors such as the growth and expansion of slavery through invention of the cotton gin and the domestic slave trade, as well as the will of slaves to constantly run away might explain why the framers underestimated how often this topic would create tension, yet there is no question that it certainly did just that.

The first way in which strain began to build over the fugitive slave clause came not long after the ratification of the Constitution. On February 12, 1793, the United States Congress passed its first Fugitive Slave Act, which was formally titled "An Act respecting fugitives from justice, and persons escaping from the service of their masters."[117] While the Constitution had given slaveholders the right to reclaim their escaped slaves it had not created any rules or regulations by which such action was to take place. This piece of legislation was divided into four parts, with the latter two pertaining to the handling of fugitive slaves. If a slave were to escape from a slaveholder in a state or territory and make it to a free state, the owner had the right to seize them. Next, the master needed to bring the runaway before a judge of a United States District or Circuit Court, or if they desired they could go "before any magistrate of a

[117] "Annals of Congress, 2nd Congress, 2nd Session," in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875,* 1414. Retrieved from <http://memory.loc.gov/>.

county, city, or town corporate" where the capture had been made.[118] Upon an oral testimony or legal warrant from their hometown the master was able to testify and then it was up to the official to determine whether or not the slave lawfully belonged to the individual. The second provision placed a five hundred dollar fine on anyone who sought to interfere with this system.[119] Prior to this law there had been no restrictions against helping runaway slaves or any requirements as to how the procedure could take place. Imposing such regulations on those who were opposed to the institution of slavery was upsetting to many; not to mention that a simple oral testimony was all that was necessary for a master claiming an individual as his escaped slave.

The controversy over this legislation came to the national forefront in a major United States Supreme Court case in 1842. Following the passage of the Fugitive Slave Act of 1793, many free states found fault with the provisions contained therein and created their own rules and regulations regarding the process by which an accused runaway might be returned. Pennsylvania was no exception to this trend, as the state legislature required that a justice of the peace, judge, or magistrate grant a certificate of removal before an accused fugitive slave could be taken away by their captors.[120] This was essentially the same as the provision found in the Constitution, but a simple oral testimony was not sufficient evidence in the eyes of Pennsylvania. Such requirements created problems for Edward Prigg when he and the members of his crew were unable to provide documentation that Margaret Morgan and her children belonged to his neighbor in Maryland. The fact that Margaret was married to a free black man and had resided in Pennsylvania her entire life, giving birth to at least one child there, generated suspicions that the

[118] Annals of Congress, 1415.
[119] Annals of Congress, 1415.
[120] Urofsky and Finkelman, 328.

lack of documentation heightened.[121] Prigg and the rest of his party then decided to simply take the Morgan family back to Maryland, and as a result they were charged with kidnapping. The defense claimed that it was the constitutional right of Prigg to be able to capture and remove the Morgans from freedom back into bondage, and the case was brought before the highest court in the nation.

As attention to the case was spreading throughout the nation on a topic that was already controversial the outcome was sure to be dramatic, and it certainly was. Justice Joseph Story delivered the Opinion of the Court that ruled the Fugitive Slave Act of 1793 constitutional, but then continued to take it much further. Of the other aspects of the ruling the most shocking were that no state could pass any laws which added greater restrictions to the capture or removal of runaway slaves, slaveholders and their agents were able to return fugitive slaves to their home state without following any specific guidelines, and that runaways did not possess the right to due process.[122] In other words, this granted anyone who so desired the right to seize a black person in the north and bring them to a slave state where they would be kept in bondage. In an effort to appease both northerners and southerners, Justice Story included that state officials were recommended but could not be "compelled to enforce" the process of capturing and returning runaways.[123] This inspired many northern states to pass laws which ordered officials to not participate and prohibited the use of state facilities. A major part of the rationale for Justice Story's ruling was based on the belief that the fugitive slave clause was of profound importance and must be adhered to. He made this clear by wrongly stating that: "… it cannot be doubted that it (fugitive slave clause) constituted a fundamental article, without the adoption of which the

[121] Urofsky and Finkelman, 328.
[122] Urofsky and Finkelman, 329.
[123] "*Prigg v. Pennsylvania,"* in *Constitutional & Legal History,* 331-332.

Union could not have been formed."[124] This was an errant notion because, as mentioned previously, this provision was not debated and was thrown into the Constitution as somewhat of an after-thought. *Prigg v. Pennsylvania* certainly did much in regards to validating and expanding regulations surrounding fugitive slaves, but this was not the last time that the issue would present itself in a national manner.

Surprisingly, the ruling in *Prigg* upset southerners more than northerners because they were aggravated by the fact that state officials in free states did not have to participate in the process. Many believed that "the law was flagrantly ignored in the North," which led to even greater concern among slaveholders.[125] With the issue of fugitive slaves playing a role in the increasing tensions between the two sections of the nation, Congress attempted to alleviate the situation through the creation of a new Fugitive Slave Act, which was part of the overall Compromise of 1850. As if the clause in the Constitution, law of 1793, and ruling by the Supreme Court were not pro-slavery enough, this new act was undoubtedly so. Under the new law, all marshals and deputy marshals were required to arrest anyone suspicious of being a fugitive slave, and to assist in executing warrants. Failure to comply with any of the provisions resulted in a one thousand dollar fine. Slaveholders and their agents were permitted to obtain a warrant from the courts and then capture an accused runaway, or could first seize the individual then bring them before a judge and provide testimony. The accused were denied the right of due process, and any citizen who was found obstructing the process in any way was subject to up to a one thousand dollar fine and six months in prison.[126] Another aspect of the act was that a judge or commissioner who was responsible for determining the status of an accused runaway would

[124] "*Prigg v. Pennsylvania,"* in *Constitutional & Legal History,* 330.
[125] Urofsky and Finkelman, 367.
[126] "Fugitive Slave Act (1850)," in *Constitutional & Legal History*, 369-370.

receive five dollars for ruling them to be free and ten if they found them to be a fugitive.[127] This act alarmed northerners, but it is estimated that in the ten years following its passing a mere three hundred fifty of ten thousand fugitive slaves were actually returned to their masters, which caused many southerners to more intensely believe that the law was neglected in the North.[128] So, while it was anticipated that the Fugitive Slave Act of 1850 would play a part in easing the tensions between the sections of the nation, in reality it did just the opposite as growing angers soon burst into a violent conflict known as the American Civil War.

This viewpoint has been thoroughly explored by historian James Oakes who expressed his arguments in the article, "The Political Significance of Slave Resistance." Oakes suggests that fugitive slaves directly impacted the political spectrum of the United States through their efforts by highlighting the sectional differences between the northern and southern states. During the "fugitive slave crisis," or the period in which tensions over the issue were building, the runaway slaves were able to expose the conflicting laws of the two sections of the country.[129] While the free states had created Personal Liberty Laws and the southern states had pushed for the Fugitive Slave Act of 1850, if it had not been for slaves actually running away in large numbers, then the different stances would not have mattered. Yet through their efforts, they "created a potential for sectional conflict every time a slave set foot on northern soil," through bringing to light these contradictory laws.[130] Not only did runaways create stress in this manner, but their activity provided fuel for abolitionists. Anti-slavery advocates were able to play off of

[127] Urofsky and Finkelman, 367.
[128] Urofsky and Finkelman, 367.
[129] James Oakes, "The Political Significance of Slave Resistance," in *History Workshop*, No. 22, Special American Issue (Autumn 1986), Oxford University Press, 93, 95. Retrieved from <http://www.jstor.org/stable/4288720>.
[130] Oakes, 95-96.

the issues that were brought into the spotlight by escaped slaves and the accounts given in fugitive slave narratives were effective as well.[131]

These efforts by the slaves to create change rather than sit and wait for it to happen reveals an underestimate by the founding fathers as to the abilities of these individuals. At the Constitutional Convention there were delegates who clearly considered slaves to be people. Evidence for this is found in the arguments previously presented involving the inhumanity of the slave trade and contradiction of the ideals of the American Revolution and the peculiar institution. Yet the compromise that was eventually achieved in creating the three-fifths clause ultimately stated that slaves were not considered as a whole person. Along these same lines, the agreement to permit the human traffic of the slave trade for a minimum of twenty years further exhibits the notion that these individuals were regarded as inferior. It follows that the lack of attention given to the issue of fugitive slaves in 1787 likely had to do with this overall trend in belief that slaves were not capable of being a major threat in terms of taking part in a widespread movement to run away. Had the founders recognized this ability they would have been forced to spend more time trying to come up with the best way to handle the issue of fugitive slaves, yet their lack of attention and discussion points to the rationale that blacks were inferior.

There are a number of reasons why the fugitive slave issue became such a problem in the years following the Constitutional Convention. First, it simply had to do with numbers. As the slave population in the southern states continued to increase, it was inevitable that the number of runaways would escalate in direct correlation. Another explanation is that the non-slaveholding states were reluctant, and even refused, to take part in assisting with the capture and return of the accused. As anti-slavery sentiment was growing in the northern regions of the nation the chances of a runaway being able to elude capture increased. The Underground Railroad played a key role

[131] Oakes, 95.

in this process, and over time it developed into a complex and highly successful system. Prior to slavery being outlawed in all of the northern states there was no true assurance that a fugitive slave might obtain freedom upon reaching these regions. Yet as Pennsylvania, New York, Massachusetts, New Jersey, New Hampshire, Rhode Island, and Connecticut had all installed at least an act for gradual emancipation by 1805 the likelihood of remaining free from bondage after running away began to increase. Still another factor that played a role is that as slaves began to be second and third generation Americans they became more knowledgeable of the landscape, language, and opportunities to receive help on their journey. This undoubtedly encouraged and motivated slaves to take the risk at obtaining freedom.

The fugitive slave clause was unanimously agreed upon on August 29, 1787. This came after the idea had only been mentioned once previously, one day earlier, in a discussion that lasted for only a few moments. A desire to refrain from further long-winded debate on a new issue, lack of importance in the eyes of the delegates, and an underestimation of the capabilities of the slaves are all potential reasons as to the minimal attention paid to the topic. The most likely explanation comes from the fact that the Northwest Ordinance had been passed while the Convention was in session. It contained a fugitive slave provision of its own, making a strong case for such a clause to appear in the Constitution as well. The seemingly insignificant matter proved to have dramatic effects on the nation in the following years as demonstrated by the Fugitive Slave Acts of 1793 and 1850, and the U.S. Supreme Court case *Prigg v. Pennsylvania* (1842). The issues surrounding these events did much in the way of exposing the increasing sectional tension between the North and South, which played a significant role in leading to the American Civil War.

# Conclusion

As scholarship has attempted to demonstrate in recent times, early United States history has unfortunately been stained with slavery. The founding document of the nation, the Constitution, is no exception. The three provisions which affected the institution most directly are the three-fifths, slave trade, and fugitive slave clauses. Of these sections, the latter proved to be by far the most controversial in the long-run. Although the other two received lengthy debates and caused great concern in 1787 during the General Convention and over the next few years as the states discussed ratification, they caused limited levels of strain on the nation throughout their duration. Yet had it not been for their inclusion in the founding document there more than likely would have been no union of the states as there came to be. Whether or not they would have been the only ones, it is certain that South Carolina and Georgia posed the greatest threat of refusing to ratify the Constitution. As for the fugitive slave clause, one can only speculate as to what would have happened had there been debate on the issue, but the bottom line is that there was no discussion on the topic. It was unanimously agreed upon after being brought up only twice. Perhaps the founders did not anticipate fugitive slaves to be numerous because they saw them as incapable of such a widespread effort, or it was assumed that the issue would take care of itself, but ultimately it was overlooked. In the roughly seventy years from the ratification of the Constitution until the outbreak of the American Civil War this clause blatantly revealed itself

to have the most dramatic effect on the United States in comparison with the other main slave-related provisions.

It would have been tremendously impressive if any of the founders were able to foresee that the issue of fugitive slaves was going to escalate to grand proportions during the mid-nineteenth century. In 1787 the sectional differences had not grown to the level they eventually reached in regards to the North being anti-slavery while the South increasingly utilized the peculiar institution. Slavery was yet to become widely implored as a means of running vast plantations for the cultivation of mass amounts of lucrative crops. The increasing number of slaves and the harsh conditions generated greater participation in the efforts of running away. For these reasons the men who shaped the United States cannot be blamed for having demonstrated oversight in regards to the turmoil this issue would create, yet failure to recognize slaves as capable of generating change through their own efforts can be attributed to the founders. Whether this notion is agreed upon or refuted, the irony of the changes in levels of significance of the matters addressed by the three most slave-related clauses of the Constitution is more difficult to deny.

The issue of determining whether or not to count slaves towards apportionment in the House of Representatives and for purposes of direct taxation was fueled by several categories of opinion in 1787. Basically, there were those who thought that slaves were undoubtedly considered property by their owners and it would be out of the question to count them as part of the population, others who believed slaves to be the equivalent of poor laborers of the North and as a result should be counted, and still those who held that this method would strictly benefit slaveholders while putting the rest of the nation at risk. However, following the compromise on the ratio of three-fifths, the matter faded out of the spotlight. The explosion in population

numbers in the northern states rendered the addition of southern House members futile because the population in those states grew at only about half the rate. Similarly, contention over the ability of Congress to control the slave trade was intense during the Constitutional Convention. Some delegates held that to explicitly put a restriction on Congress in regards to this topic was absurd. Another portion of the members were willing to put their individual preferences aside in order to ensure a Constitution that would be quickly and unanimously be ratified by the states. Finally, the men from South Carolina and Georgia insisted on the protection of the trade, as they relied upon it for their survival. Yet by 1808 these states had satisfied themselves in regards to the international importation of slaves, and following the outlawing of the process by Congress in that same year the domestic slave trade was beginning to rapidly expand, making any future needs easily fulfilled and eliminating controversy over re-opening the ports.

The controversy over the fugitive slave clause among the delegates to the Constitutional Convention can hardly be compared with the other two provisions because it was barely mentioned. Yet its influence on the nation as a whole over the subsequent seventy years far outweighed that of the issues of representation or the slave trade. The Fugitive Slave Act of 1793, *Prigg v. Pennsylvania* (1842), and the Fugitive Slave Act of 1850 are the most profound ways by which this reality was exposed. Increasing numbers of slaves in the southern states, harsh conditions, and aid from abolitionists did much to instigate a vast amount of slaves to flee from bondage and journey to the North. As this continuously occurred the sectional differences between the two halves of the nation were highlighted and tensions increased. While it goes beyond the scope of this paper, the explosion of turmoil between the North and South in the American Civil War was certainly brought about to some extent through the controversies surrounding fugitive slaves. It is greatly ironic that of the blatantly slave-related clauses of the

Constitution of the United States, the one that received by far the least amount of attention at the General Convention in 1787 proved to have the most profound impact on the nation over the course of the years following its creation.

## Bibliography


Beard, Charles A. *An Economic Interpretation of the Constitution of the United States.* New York: Macmillan Publishing Co., Inc. 1913.

Berlin, Ira. *The Making of African America: The Four Great Migrations*. New York: Viking Penguin. 2010.

Bernstein, R. B. *The Founding Fathers Reconsidered.* New York: Oxford University Press. 2009.

Blumrosen, Alfred W. and Ruth G. Blumrosen. *Slave Nation: How Slavery United the Colonies & Sparked the American Revolution.* Naperville, Illinois: Sourcebooks, Inc., 2005.

Elliot, Jonathan, ed. *The Debates in the Several State Convention, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787.* 2nd ed. Vol. I-V. Washington, Printed for the Editor-Under the Sanction of Congress, 1836.

Fehrenbacher, Don E. *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery.* Edited by Ward M. McAfee. New York: Oxford University Press. 2001.

Gillespie, Michael Allen and Michael Lienesch, eds. *Ratifying the Constitution.* Lawrence, Kansas: University Press of Kansas. 1989.

Hammond, John Craig and Matthew Mason, eds. *Contesting Slavery: The Politics of Bondage and Freedom in the New American Nation.* Charlottesville, Virginia: University of Virginia Press. 2011.

Lynd, Staughton. *Class Conflict, Slavery, and the United States Constitution.* 2nd ed. New York: Cambridge University Press. 2009.

Nash, Gary B. *Race and Revolution*. Madison, Wisconsin: Madison House Publishers, Inc., 1990.

Oakes, James. "The Political Significance of Slave Resistance," from *History Workshop,* No. 22, Special American Issue (Autumn, 1986), p. 89-107. Oxford University Press. Retrieved From < http://www.jstor.org/stable/4288720 >.

Robinson, Donald L. *Slavery in the Structure of American Politics 1765-1820.* New York: Harcourt Brace Jovanovich, Inc., 1971.

Urofsky, Melvin I. and Paul Finkelman, eds. *Documents of American Constitutional & Legal History: Volume I, From the Founding to 1896.* 3rd ed. New York: Oxford University Press. 2008.

U.S. Congress, "Annals of Congress, 2nd Congress, 2nd Session," in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875.* Retrieved from <http://memory.loc.gov/cgibin/ampage?collId=llac&fileName=003/llac003.d

b&recNum=702>.

Waldstreicher, David. *Slavery's Constitution: From Revolution to Ratification.* New York: Hill and Wang. 2009.